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# An Overview of Special Populations in California Prisons

Eumi K. Lee\*

## Introduction

Throughout history, prisons have reflected the society they are intended to protect — sometimes the most troubling aspects, sometimes the most difficult and intractable aspects, and often the tensions and conflicts that exist within a society. The present California prison crisis is no different.<sup>1</sup> The crisis is a product of policy decisions made by the state legislature and the people — including determinate sentencing, the abolishment of discretionary parole, and the three-strikes law — and the popular law-and-order rhetoric of “tough on crime” and the “war on drugs.”<sup>2</sup> The prison crisis is also a reflection of society’s attitudes towards prisoners as the focus of programs has shifted away from rehabilitation to

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\* Eumi K. Lee is an Associate Clinical Professor of Law at University of California, Hastings College of the Law. This essay is the fruit of the California Corrections Crisis Conference, held March 19-20 in San Francisco, California. I am especially grateful to the Special Populations Panel — Barbara E. Bloom, Angie Junck, Alexander Li-Hua Lee, and Miss Major — for their insightful discussion, their contribution to these ideas, and their willingness to share their thoughts about this piece. I am also grateful to Kirby Canon, Cara Hughes, and May Kyi, for their involvement in the panel planning. Special credit goes to Ariel Test, whose involvement as my research assistant was invaluable.

1. As described by the three-judge panel in *Coleman v. Schwarzenegger*, “California’s prisons are bursting at the seams and are impossible to manage.” *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2009 U.S. Dist. LEXIS 67943, at \*39-40 (E.D. Cal. Aug. 4, 2009) (describing the “woefully and constitutionally inadequate” medical and mental health care, and the “unprecedented overcrowding” and its everyday effects).

2. Joan Petersilia, *California’s Correctional Paradox of Excess and Deprivation*, 37 CRIME & JUST. 207, 207-11 (2008); Hadar Aviram, *Defining the Problem*, 7 HASTINGS RACE & POVERTY L.J. (this issue, Winter 2010).

deterrence and punishment,<sup>3</sup> and as many in prison go without necessary mental health or medical treatment.<sup>4</sup>

Special populations fare no differently in the California prison system. Their treatment in the criminal justice system generally reflects not only society's view of prisoners, but also mirrors government policies concerning these groups and the discrimination or prejudices that these groups face. This mirroring happens through deliberate actions, as exemplified by the cooperation between county jails and Immigration Customs Enforcement ("ICE"), or through willful ignorance, as illustrated by the prevalent policy of anatomically classifying transgender prisoners for housing purposes with the result being high instances of sexual assault and rape among this population.<sup>5</sup> The criminal justice system is not only a reflection of our society; the system and its policies shape other institutions and the attitudes of the society as a whole.<sup>6</sup>

Given time constraints, the conference limited its panel on special populations to three groups: transgender, immigrant, and women prisoners.<sup>7</sup> Thus, this piece is limited accordingly. In discussing these populations, certain commonalities arose. Receipt of appropriate medical care was discussed, including concerns

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3. Petersilia, *supra* note 2; Aviram, *supra* note 2.

4. "As of mid-2005, a California inmate was dying needlessly *every six or seven days*" due to a lack of "constitutionally adequate medical care." *Coleman*, 2009 U.S. Dist. LEXIS 67943, at \*39.

5. See discussion *infra* Part I.

6. JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 4 (2007). See generally INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Maurer & Meda Chesney-Lind eds., 2002).

7. There are many populations that were not discussed at the conference or within this piece. For example, the incarceration of youth has been a much debated and intractable issue in California. In 2003, advocates for youth offenders filed a lawsuit, alleging unsafe and unsanitary conditions and illegal practices in state juvenile facilities. The state entered into a consent decree in November 2004. See *Margaret Farrell, Plaintiff, v. Walter Allen III, Director, California Youth Authority, Defendant*, No. RG 03079344, Consent Decree, Superior Court of California, County of Alameda. Yet, nearly five years, hundreds of millions of dollars, and multiple experts later, the state still struggles to implement the required reforms. See generally LITTLE HOOVER COMM'N, STATE OF CAL., JUVENILE JUSTICE REFORM: REALIGNING RESPONSIBILITIES (2008), available at <https://www.policyarchive.org/bitstream/handle/10207/8197/report192%20-%20no%20cover.pdf?sequence=1>; DIV. OF JUVENILE JUSTICE, CAL. DEP'T OF CORR. & REHAB., FARRELL REMEDIAL PLANS AND L.H. CLASS ACTION LAWSUIT, LEGISLATIVE BRIEFING 2 (2009) (noting that the Division of Juvenile Justice had complied with sixty-six percent of the nearly seven thousand action items from the Farrell remedial plans), available at [http://www.cdcr.ca.gov/Juvenile\\_Justice/docs/Leg\\_Briefing2009.pdf](http://www.cdcr.ca.gov/Juvenile_Justice/docs/Leg_Briefing2009.pdf). The Tenth Report by the Special Master was filed on September 3, 2009. Tenth Report of the Special Master, *Margaret Farrell v. Matthew Cate*, No. RG 03079344 (Sept. 3, 2009).

regarding inadequate medical care because of language difficulties and reluctance to provide hormone treatment to transgender individuals.<sup>8</sup> In addition, housing assignments and facilities placement was a shared concern. Given the increased collaboration between the Department of Homeland Security and local and state governments, immigrants face the possibility of out-of-state placement or deportation.<sup>9</sup> Women and transgender individuals are particularly vulnerable to sexual violence in correctional institutions, thus, housing assignment is key in preventing these occurrences. Although this issue has been addressed to a large extent for the non-transgender female population, the transgender population continues to face high risks of violence, and the state is now considering legislation that would ostensibly provide some protection.<sup>10</sup> Of course, there are specific differences among these special populations that arose as well, such as the intersection between the federal and state government policies concerning the immigrant population in prison. In addition, in examining these three populations, it is important to note that there are some prisoners who belong to more than one of these communities and, thus, may face further dangers and difficulties in prison.<sup>11</sup>

## I. Transgender Individuals in California Prisons

For many decades, the treatment of transgender individuals in prison was largely ignored in California.<sup>12</sup> However, in the past decade, there has been a growing awareness and focus on this issue as illustrated by research studies highlighting the high incidence of sexual assault and rape against transgender prisoners, a series of legal cases against the California Department of Corrections and Rehabilitation (“CDCR”), and recently introduced legislation regarding housing assignments intended to protect transgender

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8. See discussion *infra* Parts I, II.

9. See discussion *infra* Part II.

10. See discussion *infra* Part I.

11. See, e.g., Pooja Gehi, *Symposium Presentation: Struggles from the Margins: Anti-Immigrant Legislation and the Impact on Low-Income Transgender People of Color*, 30 WOMEN’S RTS. L. REP. 315, 317 (2009) (discussing how U.S. immigration detention system and mass deportations affects low-income transgender immigrants).

12. Dean Spade, *Three Myths Regarding Transgender Identity Have Led to Conflicting Laws and Policies That Adversely Affect Transgender People*, 31 L.A. LAW. 34 (2008).

prisoners.<sup>13</sup> Although there has been no official count of the number of transgender prisoners within the California correctional system, Alexander Li-Hua Lee, the founder and former Legal Director of the Transgender, Gender Variant, and Intersex Justice Project and a panelist at the conference, has estimated that there are probably two hundred transgender prisoners and at least another thousand that are gender variant.<sup>14</sup> The incarceration rate among transgender individuals is disproportionately high. A study by the San Francisco Department of Health found that close to two-thirds of male-to-female transgender individuals in San Francisco had previously been incarcerated.<sup>15</sup> The high incarceration rate has been attributed to

13. Valerie Jenness and others from University of California, Irvine have released two studies on the issue of sexual assault against transgender prisoners. VALERIE JENNESS ET AL., VIOLENCE IN CALIFORNIA CORRECTIONAL FACILITIES: AN EMPIRICAL EXAMINATION OF SEXUAL ASSAULT (2007) [hereinafter VIOLENCE IN CALIFORNIA CORRECTIONAL FACILITIES], available at [http://ucicorrections.seweb.uci.edu/pdf/Executive\\_Summary\\_of\\_Val\\_s\\_PREA\\_report.pdf](http://ucicorrections.seweb.uci.edu/pdf/Executive_Summary_of_Val_s_PREA_report.pdf); VALERIE JENNESS ET AL., TRANSGENDER INMATES IN CALIFORNIA'S PRISONS: AN EMPIRICAL STUDY OF A VULNERABLE POPULATION (2009), available at <http://ucicorrections.seweb.uci.edu/sites/ucicorrections.seweb.uci.edu/files/Transgender%20Inmates%20in%20CAs%20Prisons%20-%20An%20Empirical%20Study%20of%20a%20Vulnerable%20Population.pdf>.

These studies were the result of Congress' passage of the Prison Rape Elimination Act (PREA) of 2003 (Pub. L. No. 108-79, 117 Stat. 192 (codified at 42 U.S.C. § 15601 (2003))), which authorized funding for state-level programs and research. Petersilia, *supra* note 2. In part in reaction to these studies, the California state legislature recently passed the LGBT Prisoner Safety Reform Act, Assembly Bill 382, which would add sexual orientation and gender orientation to the list of factors to be considered for purposes in housing of prisoners. Assem. 382, 2009 Leg., Reg. Sess. (Cal. 2009), available at [http://info.sen.ca.gov/pub/09-10/bill/asm/ab\\_0351-0400/ab\\_382\\_bill\\_20090911\\_enrolled.html](http://info.sen.ca.gov/pub/09-10/bill/asm/ab_0351-0400/ab_382_bill_20090911_enrolled.html). Recent cases relating to the treatment of transgender prisoners include *Giraldo v. CDCR*, in which the California Court of Appeals held that the "special relationship" between the prisoner and jailer gives rise to a duty of care for the jailer to protect the prisoner from foreseeable harm inflicted by a third party. 85 Cal. Rptr. 3d 371, 375 (2008). See *Doe v. Chastan*, No. CIV S-08-2091-CMK-P, 2008 U.S. Dist. LEXIS 106043, at \*1-5 (E.D. Cal. Dec. 29, 2008) (civil rights action under 42 U.S.C. § 1983, alleging that the defendants failed to protect or provide appropriate housing for plaintiff, who was a pre-operative transsexual); *Samuels v. Cal. Dep't of Corr. & Rehab.*, No. CIV S-05-2337 GEB JFM P, 2007 U.S. Dist. LEXIS 33657, at \*2 (E.D. Cal. May 7, 2007); *Medina-Tejada v. Sacramento County*, No. CIV. S-04-138 FCD/DAD, 2006 U.S. Dist. LEXIS 7331, at \*1-2 (E.D. Cal. Feb. 24, 2006) (civil rights action under 42 U.S.C. § 1983 by pre-operative male to female transgender asylee for treatment in county jail). The U.S. Supreme Court has previously held that "a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Farmer v. Brennan*, 511 U.S. 825, 847 (1994).

14. "Gender variant" meaning that "they bend traditional gender roles in some way." Tali Woodward, *Life in Hell*, S.F. BAY GUARDIAN ONLINE, [http://www.sfbg.com/40/24/cover\\_life.html](http://www.sfbg.com/40/24/cover_life.html) (last visited Aug. 30, 2009). For further definitions of gender-related terms, see Gender Related Terminology, <http://www.genderspectrumfamily.org/terminology.shtml> (last visited Nov. 18, 2009).

15. San Francisco Public Health Transgender Community Project (1999) <http://hivinsite.ucsf.edu/InSite?page=cftg-02-02>. See also Alexander Lee, *Gendered Crime &*

exclusion of this population from the legal economy, which forces many of its members to turn to illegal activities and thus greatly increases their risk of arrest.<sup>16</sup>

The transgender community is particularly vulnerable to sexual assault and rape within prison. The number of individuals who have been victims of sexual violence in prison is staggering. A recent CDCR study showed that sixty-seven percent of lesbian, gay, bisexual, and transgender (“LGBT”) prisoners report having experienced sexual assault — a rate that is fifteen times higher than the rate for overall population.<sup>17</sup> A CDCR-UC Irvine study revealed that fifty-nine percent of transgender women were sexually assaulted while in California correctional facilities, translating to the disturbing fact that transgender women are thirteen times more likely to be sexually assaulted while in prison.<sup>18</sup> While two or three percent of general population in correctional facilities reported rape, forty-one or fifty percent of transgender individuals reported rape.<sup>19</sup> In contrast to non-transgender prisoners, who reported general awareness and responsiveness from prison officials when sexual assault incidents occurred, transgender prisoners reported that officials were generally unaware of the incidents, and no medical attention was provided the majority of the time.<sup>20</sup>

The vulnerability of the transgender population to sexual assault and rape in prison is caused in large part by the prison system’s classification of transgender individuals and the repercussions of that

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*Punishment*, 4 GIC TIP J. 1, 4-5 (2004) (discussing more recent surveys of the San Francisco transgender community conducted by various organizations).

16. “There are numerous reasons that trans people are more susceptible to the criminal justice system. Trans people experience high levels of unemployment or underemployment, homelessness, lack of identification, lack of healthcare, black market health care and criminal activity, and exposure to violence or harassment.” Kylar W. Broadus, *Symposium: Intersections of Transgender Lives and the Law: The Criminal Justice System and Trans People*, 18 TEMP. POL. & CIV. RTS. L. REV. 561, 561-62 (2009). See also Spade, *supra* note 12; Sydney Tarzwell, Note, *The Gender Lines Are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167, 171-76 (2006).

17. Assem. 382, Bill Analysis, Assem. Comm. on Pub. Safety, 2009-10 Leg., Reg. Sess. (Cal. 2009), available at [http://info.sen.ca.gov/pub/09-10/bill/asm/ab\\_0351-0400/ab\\_382\\_cfa\\_20090327\\_110439\\_asm\\_comm.html](http://info.sen.ca.gov/pub/09-10/bill/asm/ab_0351-0400/ab_382_cfa_20090327_110439_asm_comm.html).

18. VIOLENCE IN CALIFORNIA CORRECTIONAL FACILITIES, *supra* note 13, at 3.

19. *Id.* It appears that the variation in the percentage of transgender individuals who reported rape was caused by “[t]wo different measures of rape” used by the researchers. One measure relied “on the inmates’ own assessment of incidents[.]” and the other relied “on an operationalization of rape as ‘oral or anal penetration by force or threat of force.’” *Id.*

20. *Id.* at 4.

classification on their housing placements.<sup>21</sup> The prison system relies heavily on a dichotomous, sex-based means of classification.<sup>22</sup> Prisoners are classified by their biological attributes rather than their gender identification. As described by William (“Joe”) Sullivan, Associate Secretary of the CDCR in December 2008, “[t]he classification process is gender-neutral . . . . We really don’t distinguish between transgender and non-transgender inmates.”<sup>23</sup> Thus, preoperative, male-to-female transgender prisoners are often placed in men’s facilities.<sup>24</sup> Although CDCR recently amended its Department Operations Manual in April of 2009, to require consideration of whether the prisoner has been a victim of sexual assault in initial and subsequent assignments to double-cell housing,<sup>25</sup> this consideration does not affect the classification of prisoners as male or female for purposes of facilities assignment.

Recent legislation may help address this issue. Assembly Member Tom Ammiano introduced AB 382 in the California Assembly in February of 2009.<sup>26</sup> AB 382, entitled the LGBT Prisoner Safety Reform Act, would amend the Sexual Abuse in Detention Elimination Act of 2005<sup>27</sup> by adding “[s]elf-reported

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21. Tarzwell, *supra* note 16, at 176-77; Darren Rosenblum, “Trapped” in *Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 516-21 (2000) (detailed discussion of various placements and their effects on transgendered prisoners).

22. Tarzwell, *supra* note 16, at 176-81; Rosenblum, *supra* note 21, at 503-08 (defining and discussing “gender binarism” and its inconsistency “with fundamental and psychological realities”).

23. Megan Myers, *Sentenced to Rape*, S.F. BAY GUARDIAN, Dec. 24, 2008. An official from CDCR also stated that CDCR places prisoners self-identifying as transgender in a mental health facility. Tarzwell, *supra* note 16, at 194 n.123.

24. Woodward, *supra* note 14.

25. Cal. Dep’t of Corr. & Rehab., *Article 46 Inmate Housing Assignments*, in DEPARTMENT OPERATIONS MANUAL §§ 54064.4, 54064.5 (2009), available at [http://www.cdcr.ca.gov/Regulations/Adult\\_Operations/docs/DOM/NCDOM/2009NCDOM/09-05/Text%20-%20NCDOM%2009-05%20Inmate%20Housing%20Assignments.pdf](http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/DOM/NCDOM/2009NCDOM/09-05/Text%20-%20NCDOM%2009-05%20Inmate%20Housing%20Assignments.pdf). See also Cal. Dep’t of Corr. & Rehab., *Corrections to Operations Manual*, [http://www.cdcr.ca.gov/Regulations/Adult\\_Operations/NCDOM\\_2009.html#NCDOM09-05](http://www.cdcr.ca.gov/Regulations/Adult_Operations/NCDOM_2009.html#NCDOM09-05).

26. Assem. 832, Bill Analysis, Assem. Comm. on Pub. Safety, 2009-10 Leg., Reg. Sess. (Cal. 2009), available at [http://info.sen.ca.gov/pub/09-10/bill/asm/ab\\_0351-0400/ab\\_382\\_cfa\\_20090327\\_110439\\_asm\\_comm.html](http://info.sen.ca.gov/pub/09-10/bill/asm/ab_0351-0400/ab_382_cfa_20090327_110439_asm_comm.html). For an interesting comparative study, see Rebecca Mann, *The Treatment of Transgender Prisoners, Not Just an American Problem — A Comparative Analysis of American, Australian, and Canadian Prison Policies Concerning the Treatment of Transgender Prisoners and a “Universal” Recommendation To Improve Treatment*, 15 L. & SEXUALITY 91 (2006).

27. The Sexual Abuse in Detention Elimination Act is codified as CAL. PENAL CODE § 2635 *et seq.* (West 2009). The act was “instituted to prevent sexual violence and promote inmate and ward safety in the Department of Corrections and Rehabilitations.” *Id.* § 2636. See also 3 Witkin, Cal. Crim. Law § 66 (3d. 2000).

safety concerns related to sexual orientation and gender identity” to a list of factors to be considered for purposes of classification and housing assignments of prisoners.<sup>28</sup> At the time of publishing, AB 382 had passed the California Senate and Assembly.<sup>29</sup>

Advocates for AB 382 hope that the explicit consideration of sexual and gender orientation as factors in classification and housing assignments will diminish the incidents of sexual assault and rape of transgender prisoners,<sup>30</sup> and lead to further action by the state to improve the conditions for transgender prisoners. Assuming that AB 382 is signed by Governor Arnold Schwarzenegger, the extent of the protection that the legislation will afford transgender prisoners remains unclear. Will CDCR continue to house prisoners based on their biological attributes, despite their gender identity, and offer the mere protection of segregation within the facilities?<sup>31</sup> Will CDCR create a separate transgender facility or will they place individuals according to their gender self-identification?

Beyond sexual assault and rape within prison, transgender prisoners have faced difficulties receiving appropriate medical care

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28. Assem. 832, 2009-2010 Leg., Reg. Sess. (Cal. 2009), *available at* [http://info.sen.ca.gov/pub/09-10/bill/asm/ab\\_0351-0400/ab\\_382\\_bill\\_20090911\\_enrolled.html](http://info.sen.ca.gov/pub/09-10/bill/asm/ab_0351-0400/ab_382_bill_20090911_enrolled.html). The present language of section 2636 requires the CDCR to take into account certain “risk factors that can lead to inmates and wards becoming the target of sexual victimization or of being sexually aggressive toward others.” CAL. PENAL CODE § 2636(a). The risk factors that are presently considered by CDCR are: “(1) Age of the inmate or ward[;] (2) Whether the offender is a violent or nonviolent offender[;] (3) Whether the inmate or ward has served a prior term of commitment[;] and] (4) Whether the inmate or ward has a history of mental illness.” CAL. PENAL CODE § 2636(a)(1-4). The LGBT Prisoner Safety Reform Act would add two additional risk factors: “[s]elf-reported safety concerns related to the sexual orientation and gender identity of the inmate or ward” and “[w]hether the offender is a violent or nonviolent offender.” Assem. 382, 2009-2010 Leg., Reg. Sess. (Cal. 2009).

29. Assem. 832, 2009-2010 Leg., Reg. Sess. (Cal. 2009), *available at* [http://info.sen.ca.gov/pub/09-10/bill/asm/ab\\_0351-0400/ab\\_382\\_bill\\_20090911\\_enrolled.html](http://info.sen.ca.gov/pub/09-10/bill/asm/ab_0351-0400/ab_382_bill_20090911_enrolled.html).

30. Equality California, AB 832 — LGBT Prisoner Safety Act, <http://www.eqca.org/site/pp.asp?c=kuLRJ9MRKrH&b=5023715>.

31. A recent Department of Justice report listed as one of the “best practice” recommendations, “[s]egregate and, subject to staffing limitations, provide enhanced security for transgendered inmates, but with the same programming and privileges of general population inmates.” DEP’T OF JUSTICE, REPORT ON RAPE IN FEDERAL AND STATE PRISON IN THE U.S. 40 (2008), *available at* [http://www.ojp.usdoj.gov/reviewpanel/pdfs/prea\\_finalreport\\_080924.pdf](http://www.ojp.usdoj.gov/reviewpanel/pdfs/prea_finalreport_080924.pdf). This type of segregation stands in stark contrast to the “administrative segregation” that too often occurs in the prison system nationwide. Tarzwell, *supra* note 16, at 180 (discussing administrative segregation and the fact that it often becomes punitive in nature and similar to solitary confinement). There have been a growing number of scholars discussing the placement of the transgender population in prisons. *See, e.g.*, Rosenblum, *supra* note 21, at 523-36 (discussing various placement options for transgender prisoners); Christine Peek, *Breaking out of the Prison Hierarchy: Transgender Prisoners, Rape, and the Eighth Amendment*, 44 SANTA CLARA L. REV. 1211 (2004).



in prison, including gender-affirming medical care such as hormone treatment.<sup>32</sup> In addition, they continue to face discrimination from prison guards and through unfair custodial policies.<sup>33</sup>

## II. Immigrants in California Prisons

Immigrants represent approximately seventeen percent of the adult prison population in California.<sup>34</sup> In addition to those who are undocumented (i.e., without legal status in the United States), some are citizens who have naturalized since immigrating to the United States; others are noncitizens who are legally within the United States as long-term permanent residents or on visas.<sup>35</sup> Strikingly, the institutionalization rates for these immigrant populations are significantly lower than their U.S.-born counterpart.<sup>36</sup> However, given the large number of immigrants in California<sup>37</sup> and the complex intersections between federal immigration law and the criminal justice system, the immigrant experience in California

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32. Woodward, *supra* note 14; Tarzwell, *supra* note 16, at 180-81. CDCR has taken the position that hormone treatment should be administered; however, "sex-reassignment surgery would be cosmetic and denied." Tarzwell, *supra* note 16, at n.126.

33. Lee, *supra* note 15, at 9-10 (discussing "homophobic and transphobic slurs from staff" and "disproportionally severe punishment for minor infractions of facility rules[,] as well as "gender check" strip searches) (on file with author); *c.f.* Zachary Wolf, *Gay and Lesbian Prisoners: Recent Developments and a Call for More Research*, PRISON LEGAL NEWS, [https://www.prisonlegalnews.org/\(S\(t0tlu545yqezlt2q5cpxibrs\)\)/20578\\_displayArticle.aspx](https://www.prisonlegalnews.org/(S(t0tlu545yqezlt2q5cpxibrs))/20578_displayArticle.aspx) (last visited Nov. 13, 2009) (discussing the intersection of conjugal visits and the recent recognition of gay marriages by certain jurisdictions).

34. Kristin F. Butcher et al., *Crime, Corrections, and California: What Does Immigration Have to Do with It?*, 9 CALIFORNIA COUNTS: POPULATION TRENDS AND PROFILES, no. 3, at 1. For the purposes of this discussion, the term "immigrants" refers to foreign-born individuals with varying legal status in the United States, including those who have naturalized and are U.S. citizens, those who are lawful permanent residents or legally in the country with visas, and those who are undocumented (i.e., without legal status in the country). Unless explicitly noted otherwise, the term "noncitizens" refers to both individuals who are in the country illegally and individuals who are legally in the country as permanent residents or on visas.

35. *Id.* at 4. Immigrant prisoners come from a diverse range of countries with Mexico and Central America having a slightly higher rate of institutionalization than those from Asia and Southeast Asia. *Id.* at 10-11.

36. *Id.* at 7-8.

37. One in four Californians is an immigrant, the highest proportion of any state. PUB. POL'Y INST. OF CAL., JUST THE FACTS: IMMIGRANTS IN CALIFORNIA (2008), available at [http://www.pplic.org/content/pubs/jtf/JTF\\_ImmigrantsJTF.pdf](http://www.pplic.org/content/pubs/jtf/JTF_ImmigrantsJTF.pdf). Thirty-five percent of the adult population of California are immigrants. *Id.* A recent study by The Pew Center determined that there are 2.7 million undocumented immigrants in California. JEFFREY S. PASSEL & D'VERA COHN, PEW RESEARCH CTR., A PORTRAIT OF UNAUTHORIZED IMMIGRANTS (2009), <http://pewresearch.org/pubs/1190/portrait-unauthorized-immigrants-states>.

prisons is truly distinctive. Moreover, the laws and policies discussed in this section affect not only noncitizens (whether illegal or legal),<sup>38</sup> but can at times affect U.S. citizens who are *perceived* to be noncitizens due to their race, appearance, name, or birth abroad.<sup>39</sup>

The ongoing debate concerning immigration policy — combined with the public's fear about immigrant involvement in criminal activity<sup>40</sup> and the current correctional crisis in California<sup>41</sup> — have led to the blending of federal immigration and national security policies with state and local correctional policies.<sup>42</sup> The result is a unique set of policies and procedures that are applied to noncitizens or perceived noncitizens who enter the criminal justice system. Federal immigration enforcement programs — such as the Criminal Alien Program, Secure Communities, and the 287(g) programs<sup>43</sup> —

38. For a discussion of the deportation of long-term permanent residents following criminal conviction, see Daniel Canstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890 (2000).

39. For a discussion of how perception of immigrant status is an improper tool for profiling, see John Dwight Ingram, *Racial and Ethnic Profiling*, 29 T. MARSHALL L. REV. 55, 77 (2003); Jonathan L. Hafetz, *The Rule of Egregiousness: INS v. Lopez-Mendoza Reconsidered*, 19 WHITTIER L. REV. 843, 850 (1998); Abby Sullivan, Note, *On Thin ICE: Cracking Down on the Racial Profiling of Immigrants and Implementing a Compassionate Enforcement Policy*, 6 HASTINGS RACE & POVERTY L.J. 101, 108-9 (2009).

40. Butcher et al., *supra* note 34, at 1 (noting the contentious nature of political debates about both immigration and crime).

41. Matthew Yi, *Assembly OKs Stripped Down Prison Bill*, S.F. CHRON., Sept. 1, 2009, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/09/01/MN8219GELN.DTL>.

42. Tom Barry, *Helping Defenders Effectively Represent Noncitizens: Criminal Alien Funding and the Immigrant-Based Criminal Justice Complex* (May 13, 2009) [http://defendingimmigrants.org/news/article.251252-Criminal\\_Alien\\_Funding\\_and\\_the\\_ImmigrantBased\\_Criminal\\_Justice\\_Complex?print=1](http://defendingimmigrants.org/news/article.251252-Criminal_Alien_Funding_and_the_ImmigrantBased_Criminal_Justice_Complex?print=1); Jennifer M. Chacón, Commentary, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007).

43. For a description of these key federal criminal immigration enforcement programs, see IMMIGRANT JUSTICE NETWORK, DANGEROUS MERGER: CORRUPTING THE CRIMINAL JUSTICE SYSTEM FOR IMMIGRATION ENFORCEMENT, available at <http://www.ilrc.org/immigrantjusticenetowork/HandoutFinal5.pdf>. See also Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164, 167-8, 173 (2008).

The Secure Communities Program is a technology-based, information-sharing program that began in 2008. U.S. Immigration and Customs Enforcement, *Secure Communities*, [http://www.ice.gov/secure\\_communities/](http://www.ice.gov/secure_communities/) (last visited Sept. 3, 2009). Though this program, local law enforcement uploads fingerprints and runs them through federal databases. At the time of publication, the program was in nearly eighty counties, including Ventura and San Diego. The government plans to have the program in all jails and prisons by 2013. Anna Gorman, *L.A. County Jails to Begin Checking Immigration Status of Inmates*, L.A. TIMES, Aug. 28, 2009, available at <http://www.latimes.com/news/local/la-me-immigjail28-2009aug28,0,1616576.story>.

The 287(g) program is an initiative through which state and local law enforcement entities enter into partnerships with ICE “to receive training and delegated authority for immigration enforcement within their jurisdictions.” U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ICE

in most cases encourage and often rely on local authorities to work with ICE<sup>44</sup> from the time of arrest throughout the criminal justice process to identify all suspected noncitizens who may be removable from the United States.<sup>45</sup> In California, the Criminal Alien Program is the most extensively employed. The Criminal Alien Program focuses on identifying “criminal aliens”<sup>46</sup> who are detained in federal, state, and local facilities and seeks their removal prior to their release from criminal custody.<sup>47</sup> This program begins with local police and jails collecting place-of-birth information from individuals at arrest or upon booking into jail.<sup>48</sup> This information is shared with ICE’s Office of Detention and Removal Operation

ANNUAL REPORT 2008 5, available at [http://www.ice.gov/pi/reports/annual\\_report/](http://www.ice.gov/pi/reports/annual_report/) (last visited Sept. 3, 2009).

44. ICE is the agency within the Department of Homeland Security that is charged with interior immigration enforcement, specifically deportation and detention. U.S. Immigration and Customs Enforcement, <http://www.ice.gov/about/index.htm> (last visited Oct. 24, 2009).

45. Local authorities in California vary greatly in their compliance and partnership with federal authorities through these programs. Lasch, *supra* note 43, 169-72 (discussing the range of local authorities’ partnership with ICE). See also Norberto Santana Jr. & Tony Saavedra, *Crime Little Changed Since Deportation Programs Began*, ORANGE COUNTY REG., Dec. 16, 2007 (discussing the placement of an ICE agent in the local jail in Costa Mesa), available at <http://www.ocregister.com/article/immigrants-ice-immigration-1942524-illegal-year>; U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., AUDIT DIV., COOPERATION OF SCAAP RECIPIENTS IN THE REMOVAL OF CRIMINAL ALIENS FROM THE UNITED STATES 10, 18-19(2007), available at <http://www.usdoj.gov/oig/reports/OJP/a0707/final.pdf> (describing an ICE agent’s characterization of San Francisco County Jail and its administration as having the “bare minimum of cooperation with ICE”).

However, even in a “sanctuary city” such as San Francisco, there is tension about the protections afforded to immigrants. After several high-profile crimes, the city is embroiled in a debate about whether minors who are arrested on felony charges can be questioned about their immigration status and mandatorily referred to ICE. Lasch, *supra* note 43, at 171; Jesse McKinley, *S.F. at a Crossroads Over Immigration*, N.Y. TIMES, June 12, 2009, available at <http://www.nytimes.com/2009/06/13/us/13sanctuary.html>; Immigration Status, S.F. Admin. Code Chapter 12H, available at [http://www.sfgov.org/site/sanctuary\\_page.asp?id=81004](http://www.sfgov.org/site/sanctuary_page.asp?id=81004) (last visited Sept. 3, 2009); Marisa Lagos & John Coté, *New Sanctuary Proposal on Protecting Youth*, S.F. CHRON., Aug. 18, 2009, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/08/18/MN5K198PEI.DTL>.

46. There is much debate about the scope of the Criminal Alien Program and the term “criminal alien.” See, e.g., NAT’L IMMIGRATION FORUM, IMMIGRATION ENFORCEMENT & LOCAL LAW ENFORCEMENT: THE ABC’S OF STATE AND LOCAL COORDINATION PROGRAMS 2 (2009), available at [http://www.immigrationforum.org/images/uploads/ABCs\\_of\\_State\\_and\\_Local\\_Coordination\\_Programs.pdf](http://www.immigrationforum.org/images/uploads/ABCs_of_State_and_Local_Coordination_Programs.pdf) (noting that “[d]espite a professed focus on immigrants with serious criminal histories, ICE is still accepting illegal immigrants arrested on misdemeanors”); IMMIGRANT JUSTICE NETWORK, *supra* note 43 (“The term ‘criminal alien’ is used to describe any noncitizen who has been arrested or convicted for any criminal offense, regardless of the severity of the person’s crime or whether they are undocumented or have lawful immigration status.”).

47. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ICE ACCESS: ICE AGREEMENTS OF COOPERATION IN COMMUNITIES TO ENHANCE SAFETY AND SECURITY, [http://www.ice.gov/doclib/pi/news/factsheets/iceaccess\\_factsheet.pdf](http://www.ice.gov/doclib/pi/news/factsheets/iceaccess_factsheet.pdf); NAT’L IMMIGRATION FORUM, *supra* note 46.

48. IMMIGRANT JUSTICE NETWORK, *supra* note 43.

(“DRO”), whose officers screen and interview the identified individuals.<sup>49</sup> Upon the initial suspicion that an individual may be a noncitizen, including a lawful permanent resident who may be subject to removal from the United States, a “detainer” or immigration “hold” is placed on the individual, preventing his or her release until custody is transferred ICE.<sup>50</sup> A person can be transferred to ICE at any point in the criminal process, even if they are not charged or convicted of an offense.<sup>51</sup> In California, individuals who are convicted and sentenced and have an ICE hold placed on him or her are transferred to ICE custody after completion of their California sentence.<sup>52</sup> Upon taking of custody, ICE either transports the prisoner to a detention center pending immigration proceedings or immediately removes them from the country.<sup>53</sup>

In addition to these programs designed to identify “criminal aliens” for purposes of deportation, states and counties receive federal reimbursements for housing undocumented immigrants through the State Criminal Alien Assistance Program (“SCAAP”).<sup>54</sup> The State of California is the largest recipient of SCAAP funds, having received upwards of \$85 million through this program in recent years.<sup>55</sup>

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49. *Id.* U.S. Immigration and Customs Enforcement, Criminal Alien Program, Nov. 19, 2008, [www.ice.gov/pi/news/factsheets/criminal\\_alien\\_program.htm](http://www.ice.gov/pi/news/factsheets/criminal_alien_program.htm).

50. Lasch, *supra* note 43 (describing the detainer process); IMMIGRANT JUSTICE NETWORK, *supra* note 43 (noting that although the detainer is limited to a 48-hour period under the law, noncitizens are frequently held beyond this 48-hour limit).

51. IMMIGRANT JUSTICE NETWORK, *supra* note 43.

52. Cal. Dep’t of Corr. & Rehab., Housing Inmates Out-of-State, <http://www.cdcr.ca.gov/news/oosPlacement.html> (last visited Oct. 24, 2009).

53. *Id.* Once in federal detention centers, immigrant detainees spend an average of five months there, with the longest reported period being four years. Riddhi Mukhopadhyay, *Death in Detention: Medical and Mental Health Consequences of Indefinite Detention of Immigrants in the United States*, 7 SEATTLE J. FOR SOC. JUSTICE 693, 704 (2009). Because individuals are often not represented and are far from their family, they are lost in the system for significant periods of time. *Id.* The detention centers that individuals with ICE holds are sent to are often former prisons that are operated by private companies; they have been criticized for providing substandard medical services resulting in poor treatment and sometimes death. *Id.* at 707-8. See also Sandra Hernandez, *House Hearing Reviews Deaths in Detention*, L.A. DAILY J., Oct. 5, 2007, available at <http://www.detentionwatchnetwork.org/node/405>.

54. Bureau of Justice Assistance, BJA Programs: State Criminal Alien Assistance Program (SCAAP), <http://www.ojp.usdoj.gov/BJA/grant/scaap.html> (last visited Oct. 24, 2009).

55. E-mail from Angie Junck, Staff Attorney, Immigrant Legal Resource Center, to Eumi Lee, Associate Clinical Professor of Law, University of California, Hastings College of the Law (Sept. 25, 2009, 18:30 PST) (on file with author); OFFICE OF THE INSPECTOR GENERAL, COOPERATION OF SCAAP RECIPIENTS IN THE REMOVAL OF CRIMINAL ALIENS FROM THE UNITED STATES, AUDIT REPORT 07-07, APPENDIX III (2007), available at <http://www.usdoj.gov/oig/reports/OJP/a0707/app3.htm>.

Immigrant and civil rights advocates have voiced multiple concerns regarding the increased coordination between federal agencies and state and local authorities, arguing that the blending of immigration enforcement with the criminal justice system is problematic and fraught with error. From the outset, there has been much criticism that the process of identifying potential noncitizens is laden with racial and ethnic bias, and that appearance and last names are used as proxies for citizenship to determine who should be scrutinized.<sup>56</sup> In addition, critics argue that given the complexity of immigration law there is much room for error in the process of identifying potential noncitizens, and that many individuals who are actually U.S. citizens have had ICE holds placed on them.<sup>57</sup> In one poignant example, Mark Lyttle, an American citizen who is bipolar, was deported after signing statements that he was a Mexican citizen, although he had a valid Social Security number.<sup>58</sup> On a broader scale, immigrant and civil rights advocates contend that these federal and state partnerships have fueled anti-immigrant sentiment and the criminalization of immigrants in the media and the public at large.<sup>59</sup>

Immigrant rights advocates have also expressed concern about the treatment of immigrant prisoners while in California facilities. During her presentation at the conference, Angie Junck identified

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56. Lasch, *supra* note 43 at 172; TREVOR GARDNER II & AARTI KOHLI, CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY, THE C.A.P. EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM (2009), *available at* [http://www.law.berkeley.edu/files/policybrief\\_irving\\_FINAL.pdf](http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf). Critics have expressed great concern that these errors will multiply as local enforcement is used further for purposes of immigration enforcement. *Examining 287(g): The Role of State and Local Law Enforcement in Immigration Law: Hearing Before the H. Comm. on Homeland Sec.*, 111th Cong. 2, 4 (2009) (statement of Muzaffar A. Chishti, Director, Migration Policy Institute's Office at NYU School of Law), *available at* <http://www.migrationpolicy.org/pubs/Testimony-03-04-2009.pdf> ("Given the complexity of immigration law and the apparent paucity of supervision and training offered to agents under the current 287(g) program, harmful errors and even racially motivated law enforcement tactics may be inevitable. . . . Whereas regular ICE agents receive five months of training in the intricacies of immigration law, 287(g) officers receive four weeks of ICE training."). Federal officials contend that the Secure Communities Program will address these concerns based on the fact that every arrestee, citizen or noncitizen, will be fingerprinted and their information checked against federal immigration databases. Gorman, *supra* note 43.

57. Raha Jorjani, *Detention, Deportation, and the Immigration Consequences of Criminal Convictions: An Overview*, Iranian Am. B. Ass'n, Oct. 2008, at 2, *available at* <http://iaba.us/publications/Working%20Document%20%20Detention%20Deportation%20and%20the%20Immigration%20Consequences%20of%20Criminal%20Convictions%20-%20An%20Overview.pdf>.

58. Kristin Collins, *Feds Wrongly Deport Citizen Living in N.C.*, NEWS & OBSERVER, Aug. 30, 2009, *available at* <http://www.newsobserver.com/news/story/1507200.html>.

59. IMMIGRANT JUSTICE NETWORK, *supra* note 43; Barry, *supra* note 42.

multiple challenges faced by immigrant prisoners in California.<sup>60</sup> She noted that, once individuals have an ICE hold placed on them or are suspected of being a noncitizen, they are subject to higher security classifications and prohibited from participating in rehabilitative prison programs, certain jobs, and early work release.<sup>61</sup> In addition, they cannot be paroled and are subject to involuntary transfers to out-of-state facilities, thus taking them further from their family and their homes.<sup>62</sup> Junck also observed that non-English speakers receive inadequate medical care and are unable to understand prison policies and instruction due to the failure to provide sufficient bilingual staffing and instruction.<sup>63</sup> She further noted discriminatory treatment from counselors, teachers, and correctional officials.<sup>64</sup>

Immigrant prisoners continue to be at the forefront of the political debate about the California corrections crisis. State politicians and CDCR have specifically identified the immigrant population as a way to ameliorate the overcrowding crisis facing

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60. Angie Junck is a staff attorney with the Immigrant Legal Resource Center and an advisory board member with California Coalition for Women Prisoners (CCWP). Over the past eight years, Ms. Junck has visited the two women's prisons in Chowchilla, California, and several men's prisons and interviewed immigrant prisoners, many of whom are leaders of various immigrant communities inside. Little has been written about the experience of immigrants and Spanish speakers while incarcerated in California, though two studies have been conducted by Mills College and the CCWP Companeras Project. Rachael Stryker et al., *Over the Wall: Women Inside's Perspectives on Health Care in California Women's Prisons* (unpublished report) (undated) (on-file with author) [hereinafter *Over the Wall*]; Rachael Stryker et al., *Swimming Against the Current: Latina Perspectives on the Effects of Language Barriers in Central California's Valley State Prison for Women* (unpublished draft) (undated).

61. JESSE JANETTA, CTR. FOR EVIDENCE BASED CORR., CAL. DEP'T. OF CORR. & REHAB., *RECIDIVISM REDUCTION PROGRAM INVENTORY*, 15, 23, 31, 33, 36, 40, 43 (2007) (listing eligibility requirements for various education, reentry, and substance abuse programs), *available at* <http://ucicorrections.seweb.uci.edu/files/CDCR%20Recidivism%20Reduction%20Program%20Inventory.pdf>. These types of restrictions have been upheld numerous times by the courts. *Severino v. Negron*, 996 F.2d 1439 (2d Cir. 1993) (work release); *Deutsch v. United States*, 943 F. Supp. 276 (W.D.N.Y. 1996) (programs); *Marshall v. Reno*, 915 F. Supp. 426 (D.D.C. 1996) (programs and classification); *Franklin v. Barry*, 909 F. Supp. 21 (D.D.C. 1995) (classification). In the federal prison system, the higher security classification is based merely on noncitizenship. Federal Bureau of Prisons Program Statement 5100.08, *Inmate Security Designation and Custody Classification* (2006) at Ch. 5, 9, *available at* [http://www.bop.gov/policy/progstat/5100\\_008.pdf](http://www.bop.gov/policy/progstat/5100_008.pdf) (applying a "Public Safety Factor" (PSF) to all noncitizens).

62. Cal. Dep't of Corr. & Rehab., *Housing Inmates Out-of-State*, <http://www.cdcr.ca.gov/news/oosPlacement.html> (last visited Sept. 2, 2009).

63. Angie Junck, *Presentation at California Correctional Crisis Conference* (Mar. 20, 2009) (PowerPoint on file with author); *Over the Wall*, *supra* note 60.

64. Junck, *supra* note 63; Interview with Angie Junck, Staff Attorney with the Immigrant Legal Res. Ctr., in S.F., Cal. (Sept. 20, 2009) (describing prisoner interviews that she conducted at Valley State Prison for Women and Central California Women's Facility).

state prisons. Following the Governor's Prison Overcrowding State of Emergency Proclamation in 2006, CDCR has prioritized the involuntary transfer of noncitizens, including those who are legal residents, to out-of-state facilities.<sup>65</sup> Recently, CDCR implemented a new policy to discharge criminal aliens from state parole once deported, ensuring that should they reenter the country, they are taken into federal rather than state custody.<sup>66</sup> In addition, Governor Arnold Schwarzenegger's current prison population reduction proposal includes the commutation of the state sentences of deportable immigrant prisoners and transferring them immediately to ICE.<sup>67</sup> As the immigration reform debate continues nationwide and as California continues to grapple with the overcrowding crisis in its prisons, the fate of immigrant prisoners in the California correctional system remains to be seen.

### III. Women in California Prisons

There are over 11,000 women in prison in California, constituting approximately seven percent of the overall prison population.<sup>68</sup> Although a seemingly small percentage, the female prison population has been growing more rapidly than its male

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65. Governor Arnold Schwarzenegger, Prison Overcrowding State of Emergency Proclamation (Oct. 4, 2006), <http://gov.ca.gov/index.php?/proclamation/4278>; Andy Furillo, *Prisoners Sent to Mississippi*, SACRAMENTO BEE, Aug. 18, 2007.

66. Press Release, Cal. Dep't. of Corr. & Rehab., CDCR to Discharge Deported Criminal Aliens to Federal Authorities (Mar. 2, 2009), available at [http://www.cdcr.ca.gov/news/2009\\_Press\\_Releases/Mar\\_02.html](http://www.cdcr.ca.gov/news/2009_Press_Releases/Mar_02.html).

67. Yi, *supra* note 41; CAL. DEP'T. OF CORR. & REHAB., PRISON POPULATION AND BUDGET REDUCTION PACKAGE 1-2 (2009), available at <http://www.counties.org/images/users/1/AOJ%20CDCR%20Pop&Budget%20Reduc%20Proposals%207.27.09.pdf>. CDCR reports that there are 15,800 prisoners identified as ICE holds in California state prisons, and that sixty to seventy percent of these prisoners are eligible for deportation. Cal. Dep't of Corr. & Rehab., Housing Inmates Out-of-State, <http://www.cdcr.ca.gov/news/oosPlacement.html> (last visited Sept. 2, 2009).

68. OFFENDER INFO. SERVS., CAL. DEPT. OF CORR. & REHAB., CALIFORNIA PRISONERS & PAROLEES 2007 19 (2008) [hereinafter CALIFORNIA PRISONERS & PAROLEES 2007], available at [http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/Annual/CaPris/CALPRISd2007.pdf](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CaPris/CALPRISd2007.pdf). In 2008, women constituted approximately 6.7 percent of the population in prison. CAL. DEP'T OF CORR. & REHAB., FOURTH QUARTER 2008 FACTS AND FIGURES 2 (2008), available at [http://www.cdcr.ca.gov/Divisions\\_Boards/Adult\\_Operations/docs/Fourth\\_Quarter\\_2008\\_Facts\\_and\\_Figures.pdf](http://www.cdcr.ca.gov/Divisions_Boards/Adult_Operations/docs/Fourth_Quarter_2008_Facts_and_Figures.pdf). The national percentages are comparable. As of June 2008, over 115,000 women were incarcerated in state and federal prisons; this number represented more than seven percent of the overall prison population. HEATHER C. WEST AND WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, PRISON INMATES AT MIDYEAR 2008 — STATISTICAL TABLES 3, 5 (2009).

counterpart since the mid-1980s.<sup>69</sup> Since the 1970s, the female prison population in California has increased more than ten-fold.<sup>70</sup> In 1977, California penal institutions housed 671 female prisoners; in 1987, there were 4,152 women incarcerated in CDCR facilities; in 2007, there were 11,416.<sup>71</sup> As with the general prison population, experts have attributed the increase in the numbers of incarcerated females to California's shift away from the indeterminate sentencing regime in the 1970s, various "tough on crime" policies, legislation enacted as part of the "war on drugs," and other developments in law enforcement and parole policy generally, including a policy shift from reform and rehabilitation to punishment and deterrence.<sup>72</sup>

The majority of incarcerated women have been convicted of nonviolent offenses. In 2007, only 32.1% of women prisoners were convicted of crimes against persons; the remaining 67.9% were convicted for nonviolent property crimes, drug crimes, and other

69. Angela Wolf, Barbara E. Bloom & Barry A. Krisberg, *The Incarceration of Women in California*, 43 U.S.F. L. REV. 139, 140 (2008). From 2001 to 2006, while the number of men in California jails increased by eleven percent, the number of women increased by twenty-one percent. *Id.* The higher increases of women in California prisons and jails are comparable to the national trend. As noted by the Pew Center of the States, although "[m]en still are roughly 10 times more likely to be in jail or prison, the female population is burgeoning at a far brisker pace. For black women in their mid- to late-30's, the incarceration rate also has hit the 1-in-100 mark." PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 3 (2008), available at <http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf>.

70. CANDACE KRUTTSCHNITT & ROSEMARY GARTNER, MARKING TIME IN THE GOLDEN STATE WOMEN'S IMPRISONMENT IN CALIFORNIA 32 (2005); CALIFORNIA PRISONERS & PAROLEES 2007, *supra* note 68.

71. Natasha A. Frost, *State-by-State Analysis*, in THE PUNITIVENESS REPORT — HARD HIT: THE GROWTH IN IMPRISONMENT OF WOMEN, 1977-2004 31, 45 (Inst. on Women & Criminal Justice ed., 2006), available at <http://www.wpaonline.org/institute/hardhit/HardHitReport4.pdf>; OFFENDER INFO. SERVS. BRANCH, CAL. DEP'T. OF CORR. & REHAB., HISTORICAL TRENDS 1987-2007 1A tbl.1 (2008) [hereinafter HISTORICAL TRENDS 1987-2007] (showing decreases in the incarcerated female population in 1991, 1999, 2000, and 2001). The 2007 numbers represented a decline in both the female and male populations in CDCR facilities. *Id.* (showing decreases in the incarcerated female population in 1991, 1999, 2000, 2001, and 2007).

72. Wolf et al., *supra* note 69, at 140-41 (noting that "[w]omen are particularly vulnerable to policy changes because they are more likely than men to be incarcerated for drug-related or petty, nonviolent property crimes[.]"). See also ANGELA WOLF, NAT'L COUNCIL ON CRIME & DELINQUENCY, REDUCING THE INCARCERATION OF WOMEN 1 (2006), available at [http://www.nccd-crc.org/nccd/pubs/2006\\_WIP\\_special\\_report.pdf](http://www.nccd-crc.org/nccd/pubs/2006_WIP_special_report.pdf); BARBARA OWEN & BARBARA BLOOM, PROFILING THE NEEDS OF CALIFORNIA'S FEMALE PRISONERS 6 (1995), available at <http://www.nicic.org/pubs/1995/012451.pdf> (discussing the impact of the "war on drugs" on women prisoners). For more detail on the movement away from indeterminate sentencing and its effect on the prison population in California, see Aviram, *supra* note 2, and Aaron Rappaport, *Sentencing Reform in California*, 7 HASTINGS RACE & POVERTY L.J. (this issue, Winter 2010). For a general discussion of the "war on crime" and its effects on American society, see JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007).



nonviolent crimes.<sup>73</sup> In contrast, 53.5% of the men incarcerated in 2007 were convicted of crimes against persons.<sup>74</sup> Because of the nature of the crimes for which they are convicted, females tend to have sentences that are far shorter than their male counterparts.<sup>75</sup> The median sentence for women prisoners in CDCR institutions in 2007 was nine months.<sup>76</sup> Similar to the male population, formerly incarcerated females have a high rate of recidivism. A recent study by CDCR found that forty-six percent of women released in 2003 returned to prison within three years;<sup>77</sup> another CDCR study indicated that between twenty-seven to thirty-three percent of female parolees recidivate within a year.<sup>78</sup>

Although sharing some characteristics with their male counterparts, certain differences in the profile of incarcerated women reveal gendered causes for their imprisonment, and unsurprisingly, their incarceration has certain gendered effects.<sup>79</sup> As with the prison population generally, the majority of women prisoners are women of color;<sup>80</sup> many come from neighborhoods entrenched in poverty; and

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73. CALIFORNIA PRISONERS & PAROLEES 2007, *supra* note 68, at 16 tbl.8 (Felon Institution Population by Offense and Gender as of December 31, 2007). Although these numbers represent only the felon institution population, they account for 11,107 of the 11,416 women in CDCR facilities. *Id.* Moreover, the other 311 women that are unaccounted for are more likely to be nonviolent offenders given the fact that they are not in felon institutions.

74. *Id.* Similarly in 2006, eighty-seven percent of women in comparison to seventy percent of men were admitted for non-violent property crimes. OFFENDER INFO. SERVS., CAL. DEP'T. OF CORR. & REHAB., CALIFORNIA PRISONERS & PAROLEES 2006 43 (2007) [hereinafter CALIFORNIA PRISONERS & PAROLEES 2006], available at [http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/Annual/CalPris/CALPRISd2006.pdf](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2006.pdf).

75. KRUTTSCHNITT & GARTNER, *supra* note 70, at 144-45.

76. CALIFORNIA PRISONERS & PAROLEES 2007, *supra* note 68, at 79-80.

77. OFFICE OF ADULT RESEARCH, CAL. DEP'T OF CORR. & REHAB., RECIDIVISM RATES SUMMARIZED WITHIN THREE YEAR FOLLOW-UP PERIOD FOR FELONS PAROLED FOR THE FIRST TIME IN 2003 (2008), available at [http://www.cdcr.ca.gov/Adult\\_Research\\_Branch/Research\\_Documents/Recidivism\\_3years\\_by\\_Month\\_2003.pdf](http://www.cdcr.ca.gov/Adult_Research_Branch/Research_Documents/Recidivism_3years_by_Month_2003.pdf). See JOAN PETERSILIA, CAL. POLICY RESEARCH CTR., UNDERSTANDING CALIFORNIA CORRECTIONS 71-76 (2006), available at <http://www.seweb.uci.edu/users/joan/Images/CPRC.pdf> (discussing generally California's recidivism).

78. OFFICE OF RESEARCH, CAL. DEP'T OF CORR. & REHAB., CHARACTERISTICS OF FEMALE OFFENDERS: PAST AND PRESENT 4 (2008), [http://www.cdcr.ca.gov/Adult\\_Research\\_Branch/Research\\_Documents/Characteristics\\_of\\_Female\\_Offenders\\_Jan\\_2008.pdf](http://www.cdcr.ca.gov/Adult_Research_Branch/Research_Documents/Characteristics_of_Female_Offenders_Jan_2008.pdf). Further discussion of the challenges of parole and recidivism are discussed elsewhere in this volume. Hadar Aviram, *Dangerousness, Risk and Release*, 7 HASTINGS RACE & POVERTY L.J. (this issue, Winter 2010).

79. See Stephanie S. Covington & Barbara E. Bloom, *Gendered Justice: Women in the Criminal Justice System*, in GENDERED JUSTICE: ADDRESSING FEMALE OFFENDERS 3, 4-7 (Barbara E. Bloom ed., 2003) (challenging the policies of "gender neutrality" within the criminal justice system).

80. CALIFORNIA PRISONERS & PAROLEES 2007, *supra* note 68, at 20. Over fifty-eight percent of female prison population are women of color; over sixty-eight percent of the male

many have substance abuse issues.<sup>81</sup> However, a disproportionately greater percentage of women prisoners have experienced physical and sexual abuse prior to admission into prison.<sup>82</sup> There are also higher levels of physical and mental health issues among female prisoners.<sup>83</sup> In addition, almost half of incarcerated women are the sole caregivers for their children.<sup>84</sup> Thus, incarceration has an immediate effect on the children who often end up in foster care, as well as a fragmenting effect on their families generally and their communities.<sup>85</sup>

Given the relatively unique characteristics of this population — including the nonviolent nature of the offenses, the shorter sentences, socio-economic factors, and motherhood — advocates, academics, and community members have strongly criticized the placement and treatment of incarcerated women in the existing institutions and programs and have strongly urged for the adoption of gender-responsive approaches.<sup>86</sup> These sentiments were echoed by the Little Hoover Commission, an independent state oversight agency in 2004.<sup>87</sup>

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prison population are men of color. *Id.* The racial/ethnic statistics provided by CDCR only provided categories for “White,” “Hispanic,” “Black,” and “Other.” *Id.*

81. HISTORICAL TRENDS 1987-2007, *supra* note 71, at 21-22. See also Wolf et al., *supra* note 69, at 141-43; LITTLE HOOVER COMM’N, STATE OF CAL., BREAKING THE BARRIERS FOR WOMEN ON PAROLE 15 (2004), available at <http://www.lhc.ca.gov/studies/177/report177.pdf>. It is estimated that between eighty and eighty-five percent of both female and male prisoners have substance abuse issues. *Id.*

82. HISTORICAL TRENDS 1987-2007, *supra* note 71, at 21-22 (discussing Angela Browne et al., *Prevalence and Severity of Lifetime Physical and Sexual Victimization Among Incarcerated Women*, 22 INT’L J.L. & PSYCH. 1, 3-4 (1999)). CAROLINE WOLF HARLOW, U.S. DEP’T OF JUSTICE, PRIOR ABUSE REPORTED BY INMATES AND PROBATIONERS 1 (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/parip.pdf>. A study by the U.S. Department of Justice revealed that fifty-seven percent of women had been physically or sexually abused prior to prison admission in contrast to sixteen percent of men. *Id.*

83. LITTLE HOOVER COMM’N, *supra* note 81, at 15.

84. *Id.* In comparison, only fifteen percent of the male prisoners were listed as the sole caregiver in the month prior to their arrest. *Id.*

85. *Id.* at vii-ix, 14-17.

86. For a detailed discussion of gender-responsive strategies, see BARBARA BLOOM, BARBARA OWEN & STEPHANIE COVINGTON, U.S. DEP’T OF JUSTICE, GENDER-RESPONSIVE STRATEGIES: RESEARCH, PRACTICE, AND GUIDING PRINCIPLES FOR WOMEN OFFENDERS (2003), available at <http://www.nicic.org/pubs/2003/018017.pdf>.

87. LITTLE HOOVER COMM’N, *supra* note 81. The Little Hoover Commission is an independent state oversight agency that was statutorily created in 1961. CAL. GOV’T CODE § 8501 *et seq.* (West 2009). The Commission’s mission is to investigate state government operations and to “promot[e]conomy, efficiency, and improved service” through reports, recommendations and legislative proposals. *Id.* § 8521.

Since the Commission's findings in 2004, California has undertaken various reform measures to address some of these concerns. In 2005, CDCR established the office of Female Offender Programs and Services within the Division of Adult Institutions and created the Gender Responsive Strategies Commission ("GRSC") as an advisory committee. In addition, CDCR developed a phased housing plan to shift Level I and II women prisoners to community-based facilities and generally has begun a new gender-responsive classification system for women.<sup>88</sup> In 2007, the legislature enacted California Penal Code section 3430 that required CDCR to develop a "Female Offender Reform Master Plan" and to create policies, operational practices, and programs designed "to ensure a safe and productive institutional environment for female offenders[.]" as well as gender-responsive rehabilitative programs and needs-based case and risk assessment.<sup>89</sup>

Despite these efforts, many of the provisions of section 3430 have not been met. As identified by Dr. Barbara Bloom during the conference,<sup>90</sup> there are numerous challenges that continue, many of which plague the California correctional system generally. Women's prisons still remain at over two hundred percent overcrowding levels. Many of the rehabilitative programs have yet to be implemented, and the construction of many of the community-based facilities has been delayed due to the fiscal crisis.<sup>91</sup> Under the state budget for fiscal year 2009 to 2010, the Female Offender Programs and Services office will experience over \$90 million in cuts that will cause "delays

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88. EXPERT PANEL ON ADULT OFFENDER & RECIDIVISM REDUCTION PROGRAMMING, CAL. DEP'T OF CORR. & REHAB., A ROADMAP FOR EFFECTIVE OFFENDER PROGRAMMING IN CALIFORNIA app. G, at 105-106 (2007), *available at* [http://www.cdcr.ca.gov/News/docs/Expert\\_Rpt/ExpertPanelRpt\\_AppendG.pdf](http://www.cdcr.ca.gov/News/docs/Expert_Rpt/ExpertPanelRpt_AppendG.pdf). Full text of the report is available at Cal. Dep't of Corr. & Rehab., <http://www.cdcr.ca.gov/News/ExpertPanel.html> (last visited Nov. 18, 2009). *See also* Press Release, Cal. Dep't Corr. & Rehab., CDCR Launches First-of-its-Kind Substance Abuse Treatment Program for Female Offenders (Sept. 30, 2008), [http://www.cdcr.ca.gov/News/2008\\_Press\\_Releases/Sept\\_30.html](http://www.cdcr.ca.gov/News/2008_Press_Releases/Sept_30.html).

89. CAL. GOV'T CODE § 8521.

90. Dr. Barbara E. Bloom is a Professor in the Department of Criminology and Criminal Justice Studies at Sonoma State University and a leading expert in this field.

91. Dr. Barbara Bloom, Presentation at the California Correctional Crisis Conference (Mar. 20, 2009) (PowerPoint on file with author). This includes facilities such as the Female Rehabilitative Community Correctional Centers and the Female Residential Multi-Service Centers. *Id.*

in contracts and an associated reduction in staffing[.]”<sup>92</sup> These budget cuts will continue to delay the construction of rehabilitative and reentry facilities and prevent the expansion of certain gender-responsive programs.<sup>93</sup>

## Conclusion

In conclusion, because each of these populations traditionally has been marginalized by American society based on their gender, race, ethnicity, or status, they are often further distanced from and marginalized by society upon incarceration. A recent president said, “you can fairly judge the character of society by how it treats the weak, the vulnerable, the most easily forgotten.”<sup>94</sup> As the people of California face the enormity of the budget and prison crisis and struggle to comply with the mandates of the three-judge panel’s monumental decision in *Coleman v. Schwarzenegger*,<sup>95</sup> the state will continue its precarious balancing act of ensuring the health and safety of prisoners while addressing public safety concerns. In doing so, the treatment of these special populations must continue to be monitored.

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92. CAL. DEP’T OF CORR. & REHAB., FACT SHEET: ADULT REHABILITATION PROGRAM REDUCTIONS DUE TO FISCAL YEAR 2009-10 STATE BUDGET 2 (2009), available at [http://www.cdcr.ca.gov/Divisions\\_Boards/Adult\\_Programs/docs/Fact\\_Sheet.pdf](http://www.cdcr.ca.gov/Divisions_Boards/Adult_Programs/docs/Fact_Sheet.pdf).

93. *Id.*

94. President George W. Bush, Commencement Address at Concordia University Wisconsin (May 14, 2004), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=63589>.

95. *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2009 U.S. Dist. LEXIS 67943, at \*394-96 (E.D. Cal. Aug. 4, 2009).

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